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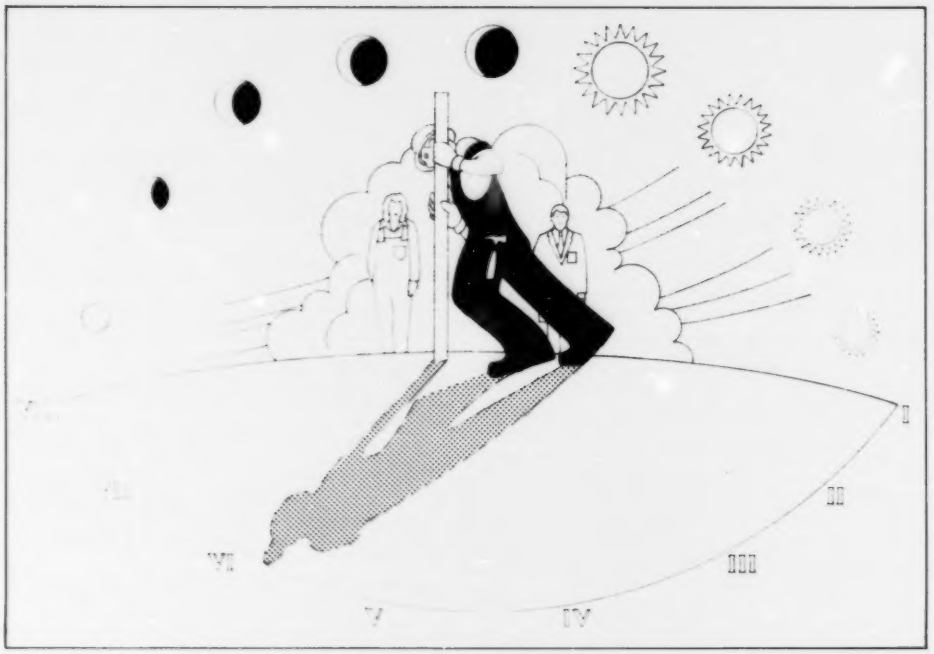

# Special Treatment Under Ontario Hours of Work and Overtime Legislation: General Issues

# SPECIAL TREATMENT UNDER ONTARIO HOURS OF WORK AND OVERTIME LEGISLATION: GENERAL ISSUES

by

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(A Report Prepared for the Ontario Task Force on Hours of Work and Overtime)

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The views expressed in this report are those of the authors and need not reflect the position of the Ontario Task Force on Hours of Work and Overtime.

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# SPECIAL TREATMENT UNDER ONTARIO HOURS OF WORK AND OVERTIME LEGISLATION: GENERAL ISSUES

## I. INTRODUCTION

The purpose of the paper is to analyze the exemptions, permits and special treatment that provide release from Ontario's limitations on hours of work and overtime. The number and variety of these exemptions from the statutory scheme suggests that some substantial need for deviations has been felt in Ontario. This paper will attempt to explain why the special treatment has occurred, using as its data base principally the work performed for and by the Task Force, supplemented by selected interviews.

Section II of the paper examines the rationale for the limitations on hours of work and overtime, then moves on to consider the rationale for the exemptions from them. Clues as to the true purposes of the exemptions are sought not only in public statements justifying them, but also in the process by which they are granted. Section III of the paper reviews the various methods of granting exemptions from the Act, and uses an economic framework to explore the different effects that may arise from employing these methods. Finally, Section IV considers the validity of alternative processes for moving from the present regulatory scheme with all its exemptions and permits to some other scheme, should incremental changes in the exemptions and permits be desired.

## II. RATIONALE FOR EXEMPTIONS

### A. Rationale for Limits Themselves

Employment standards legislation is fundamentally different from industrial relations legislation, in that the former is essentially protective of the worker, while the latter only sets a framework in which bargaining may take place. Malles (1976, p. 4)) lists four objectives of employment standards legislation:

(a) to narrow the gap in wages and working conditions between organized and unorganized workers;

(b) to protect individual employees against exploitation;

(c) to eliminate unfair competition between employers; and

(d) to raise standards of living of the working poor.

To a large extent, these objectives are consistent with the popular view that employment standards legislation sets minimum standards for the unorganized and disadvantaged worker. This investigation of the effect of employment standards legislation will accept the above as the justification for the legislation, and will, consider whether the legislation and regulations in fact serve these ends.

Limitations on hours of work and overtime, one form of employment standards legislation, do not affect the wage gap between union and non-union labour, nor do they raise the living standard of the working poor, but they may serve the other objectives listed above. The stated objective of the original limits on hours of work, set at 10 hours per day and 60 hours per week by the Ontario Factories Act, 1884 was protecting the health and safety of women and children (Task Force, Phase I Report, 1987, Ch. 3). When the Hours of Work and Vacations with Pay Act, 1944 was passed, members of the legislature recalled the tragic unemployment of the Depression, and

were concerned that the unemployment rate might soar when the troops returned after the end of World War II. Restrictions on the hours of work were seen as a means of spreading the work, or worksharing (Kinley, 1987a). An additional motivation for the legislation was said to be the provision of minimum working conditions for those workers who could not, or would not, bargain effectively for them (Task Force, Phase I Report, 1987). This object is not related to health and safety, but to the preferences of some workers for hours of work shorter than might be demanded by employers. The actual legislation that emerged, however, provided a maximum workday of eight hours, which was no longer than the average at that time, and a maximum workweek of forty-eight hours that was exceeded by many workers. This was not "minimum" protection, but something far more restrictive, the effect of which is discussed in Section III below. While the protection of the health and safety of workers remained an objective of the 1944 legislation, no evidence of harm from working more than eight hours per day or forty-eight hours per week was introduced in the legislative debate. However, statements were made to the effect that workers' health might be impaired by a longer work week (Kinley, 1987a).

The objectives of the Ministry appear not to have changed greatly since the advent of the current legislation in 1944. There is no substantial evidence demonstrating that health and safety risks exist at the current limits of 8 and 48, or at the longer hours often worked by those who are exempted or allowed by permit to work substantially longer hours (Kinley, 1987a). The length of working hours is apparently not a priority item in occupational health and safety today. Indeed, workers often demand the right to work

overtime when such work is available (Kinley, 1987a). Furthermore, while actual overtime hours worked amount to approximately 25 times the amount allowed by existing permits, (Task Force, Phase I Report, 1987, Ch. 5) there is no evidence that in general the workers involved are being exploited and require further protection. The Ministry is pressed by labour leaders, but not often by the rank and file, for restrictions on hours of work to promote worksharing or to protect those with little bargaining power. It therefore appears that the primary rationale of the current legislation is worksharing, with some emphasis on the desire to limit the working hours of those with little bargaining power.

B. Rationale for Exemptions

The rationale for exemptions from the Act or from some of its provisions may be sought in the legislation itself, in public statements and documents that accompanied its enactment, and in statements by those who have the responsibility for granting exemptions. One might also look at the process that is used to grant exemptions. That process should reveal the extent to which input is sought from various parties, and the information that is used to decide whether exemptions may be granted. The three purposes discussed above - health and safety, limiting hours for the unprotected, and worksharing - would lead to very different processes, allowing us to infer purpose from the process. For example, a process that required investigation of the availability of local unemployed labour prior to granting an exemption to an establishment would be consistent with the worksharing objective. The consider-

ation of process will be deferred to the next section of this chapter.

That a rigid application of the Act would create serious problems was recognized in the legislation itself which provided for flexibility by exempting many workers from the entire Act, exempting other workers from specific provisions of the Act, and allowing the Director to grant permits for further more limited exemptions (Kinley, 1987a). Just prior to passage of the 1944 Act almost 60 percent of male workers and 50 percent of female workers worked more than 48 hours per week (Kinley, 1987a). Even if one assumed that the end of World War II would reduce the demand by employers for overtime hours, there was no way to be certain that substantial overtime hours would not persist. The eight hour day and forty-eight hour week went far beyond setting minimum acceptable standards, and purported to legislate <u>average</u> practice at the time. Great economic disruption might attend the enactment of legislation that would substantially affect so many workers and workplaces. The government of the day clearly felt that the benefits were not worth the risks, since it allowed massive exemptions and permits. The diversity of demands for working hours continues to this day. Reid (1987, Table 1) points out that a large number of workers work part time, (19% work less than 30 hours), while almost as many (18%) average more than 44 hours. If anything, the variability of work hours is growing, partly in response to an increasingly heterogeneous workforce. In the absence of substantial complaints about these hours, we must conclude that most employers and employees are well served by a system in which work hours may vary greatly from one workplace and occupation to another.

After reviewing the history of the legislation and interviewing those in the Ministry who are responsible for administering the Act, Kinley (1987a) identifies several grounds for exemption including: difficulty in measuring hours worked; irregular, on-call or discontinuous hours; peak work loads; emergency work; strong bargaining position of the workers; and the independent status of the workers. Two aspects of this list are noteworthy. In some cases, the ground for exemption is that one or more objectives of the legislation are met without regulation. For example, workers in a strong bargaining position are regarded as capable of protecting their own health and safety and any additional interest that they might have in not working long hours. In such a case, of course, the worksharing objective is abandoned. In other cases, such as where the ground for exemption is peak work loads, there is no implication that <u>any</u> of the objectives will be achieved. Instead, they are traded off against other considerations, such as the value of flexibility to the employer. This demonstrates that the stated objectives are not sacrosanct, but are only goals that must be balanced against other goals. For example, most agricultural work, for which there are peak demands, must be as tiring physically as any other work, presenting the possibility of health and safety concerns from long hours in the fields. It is also plausible that there are unemployed workers who might share this work, and that the workers may wish a shorter work week. The exemption of these workers from the hours of work provisions (Regulation 285, <u>R.R.O</u>. 1980, S. 3(1)) on the grounds that the work is seasonal fails to address the rationales for limiting hours of work.

To this list must be added a further possible explanation for granting exemptions: unwilling ness to interfere with the market. It is at least possible that whatever the motive for legislating the limits in the first place, the government does not, in fact, wish to disrupt private contractual arrangements with respect to hours of work and overtime. The Act gives the appearance of providing wide protection; the exemptions remove that protection upon demand.

This brief review of the purpose of exemptions under the Act leaves considerable uncertainty on two issues. First, the true motive for each of the various exemptions is not clearly identified in the Act nor in the available documentation. Second, the vast numbers of the workers who are exempted from one or more provisions of the act cries out for explanation. Why pass an act so strict that a large fraction of those who might be covered, given its purposes, are exempted from some or all of its provisions? To answer these questions, we must first develop a framework for analysis, then apply that framework to the Act and regulations.

## C. Framework for Analysis

The analysis of the behaviour of the parties affected by this legislation - employers, employees and the government - will draw upon models developed in Economics and particularly in the literature on public choice. Consider first the operation of the labour market. We assume that the employer and employees bargain with each other over the terms and conditions of employment, including wages and hours of work. Each pursue their own self interest. The technology of production varies tremendously from one sector and industry to another, as do other factors such as variability of demand for the

product, and the perishability of inputs. The net result is that industries, and even firms and unincorporated employers, vary greatly with respect to the hours of work and the overtime terms that are preferred. It is easy to imagine very different demands for working hours by Ontario Hydro, an auto parts manufacturer, a computer software company, a fast food outlet, and the employer of a domestic servant. The desires of workers with respect to hours of work also vary from one individual to another and from one industry to another. Unionized workers are more successful in achieving their desires than are unorganized workers. All bargains between employers and employees are made in the shadow of existing contract law in general and labour law in particular. This law will be well known and applied as between a large employer and a strong union; it will have negligible impact for the employer of a few unorganized employees.

Labour unions, like many democratic organizations, tend to represent the median member. The median member has reasonable seniority, and may generally either accept or reject overtime work if it is available. Therefore the median member usually will prefer not to restrict the maximum hours of work since unrestricted hours offers maximum flexibility. The unemployed, the laid-off, and those with low seniority are not strongly represented in this structure.

The economic framework assumes that parties are motivited primarily by self-interest. This motivation may result in an inefficient allocation of resources when externalities exist. An externality exists when the actions of one party have an effect on another without a market transaction between them compensating for these effects. In this case, workers who work overtime may reduce

the chances for the unemployed to find work at the same plant. Since there is no market relationship between the workers and the unemployed, the workers fail to consider their effect on the unemployed. The employer, too, has no reason to consider the interests of the unemployed in deciding whether to request overtime from existing employees or to hire the unemployed. In a perfectly functioning market, the unemployed could offer to work at less than the prevailing wage, thus competing with current workers, and no externality would exist. In fact, wages are sticky, in that workers usually will not be hired at less than the prevailing rate, at least in the short run, so an externality may be said to exist. The stickiness of wages insulates the employer and current employees from the social cost of unemployment, and thus represents an externality. Economists recognize that government action may be warranted to correct the market failure that results from externalities.

Turning next to the political process, certain regulations are likely to receive support if they have the following characteristics (Trebilcock, et al. 1982, pp. 27-34). They confer benefits on marginal voters (voters who are not committed to a party, and whose vote might change the outcome of the next election in that riding) while imposing costs on non-marginal voters. The benefits will be concentrated and visible, while the costs will be diffuse and lacking in visibility. The more widely dispersed the beneficiaries, the greater the extent to which symbolic benefits may be substituted for real benefits. Bureaucrats will prefer policies that allow maximum government discretion and maximum interference with the market, in order to maximize the power and size of the regulatory staff. Where outcomes of a policy are uncertain, successful policies will maximize

flexibility and reversibility, so that continual adjustments may be made over time in the balancing of marginal interests.

This framework has several implications with respect to the behaviour of employers and employees. Employers will wish to be exempted from the Act or any provision of the Act when this will produce benefits for them, and when their workforce will allow them to use the exemption. Employees will resist exemptions when any of the following circumstances occur: their concern over health and safety exceeds their desire for additional work; they prefer the statutory scheme to a more flexible scheme for reasons unrelated to health and safety; the workers or their representatives desire to share work with other available workers. Employees protected by a union or by a collective agreement will be less concerned about resisting exemptions from the statutory scheme since they can protect themselves more effectively at the bargaining table, but they may be more successful in any resistance that is mounted.

The framework can also explain the existence of a broad regulatory act riddled with exemptions. When the current Act was first passed in 1944, labour's concern about unemployment may have been sufficient to force its passage. However, because of serious concern about rigid enforcement of the Act, the government would have wanted the high degree of flexibility and reversibility offered by an almost unfettered discretion to grant exemptions and permits. While exemptions could in practice emasculate the Act, this might not be apparent at the time of passage, and in any event the apparent broad sweep of the Act would provide symbolic reassurance to labour even if the actual protection fell far short of the promise. The exemptions are far less visible than the Act itself.

The granting of exemptions will be governed by the same principles that govern the legislation. The granting of an exemption through a regulation is not a highly visible process, so little symbolic importance is attached to it. The public interest in any of the objectives of the Act is so diffuse that the public will have no input at all into the regulatory process. Indeed, after the passage of the Act, the public generally will be indifferent to its administration. Thus the only parties to be considered when an application for exemption is made are those which have a concentrated interest in that application: employers and their employees. Only where there is an organized pool of the unemployed who might work in the establishment requesting the overtime, and who are aware of an application for exemption, is it possible for the unemployed to resist an application for exemption. Such conditions are not likely to exist in practice. They obviously do not exist in agriculture, trucking, construction, or the employment of domestics - - the four sectors that are focussed upon in Phase II of the agenda of the Task Force.

A final implication of this framework is that statements of the purpose of government action, whether legislation or regulation, should be viewed critically. There is no necessary connection between the purpose ascribed to legislation in public debate and its effects in practice. The complexity of legislation and regulations allows the creations of a gap between the actual effect of a policy and the effect ascribed to that policy in public statements. Thus the purpose of a policy may be more truly revealed in the details of the policy and its administration than in public statements about it. But how can the purpose of the exemptions from the Act be inferred? The best method is to study the process by which exemp-

tions are granted. The following guidelines for analysis are derived from the framework above.

1) If the object of the hours limit is health and safety, then exemptions should be granted only on a showing that there is no health or safety risk to workers from this particular exemption, or that any risk is balanced by benefits to the employer or the employees. The employees must have a voice in the decision, since they will have practical information about any possible risks. Serious evidence regarding health and safety risks should be sought. Enforcement may rely primarily on responding to complaints, as workers pursue enforcement of the Act for their own protection.

2) If the object of the limit is to constrain the daily or weekly hours that persons with little bargaining power are required to work, unrelated to health and safety issues, then employees should have a right to object to <u>any</u> proposed exemption. Arguments may be structured in terms of health and safety or worksharing, but serious evidence on these issues will not be sought. Enforcement may rely primarily on responding to complaints, as workers pursue compliance with the Act for their own purposes. Providing information to vulnerable employees about their rights under the law will be a prominent feature of the administration of the Act.

3) If the object of the limit is worksharing, the exemption must turn on an examination of local layoffs or unemployment rates in relation to the job opportunities in the place of work in question. Exemptions would be for a short term, since unemployment rates vary over time, and they would have a small

geographical reach, since unemployment rates vary from one location to another. Serious evidence on the state of the immediate labour market should be sought, allowing "public" input, so that the unemployed themselves may appear. Enforcement cannot rely on worker complaints, nor even on complaints of the unemployed, but must include a substantial audit function by the Ministry at times and places where unemployment is high.

D. Analysis of Exemptions, Permits, Enforcement

1. Exemptions

Many of the non-permit exemptions were part of the 1944 Act or were incorporated into the Act or regulations within a few years thereafter. The exemption of federal employees is constitutional, and not even mentioned in the Act. Crown employees are exempted in S. 2(1), presumably on the grounds that the Crown would not demand unreasonable hours from its employees, and that any necessary protection would be provided in, e.g. the Public Service Act (R.S.O. 1980, C-418 S. 30 and regulation 881, R.R.O. 1980, ss 10-14). The process for granting both of these exemptions was a part of the legislative process for the 1944 Act itself. The bulk of the remaining hours and overtime exemptions are listed in Regulation 285, SS. 3, 4, and 6. Other regulations provide additional exemptions from one or more of the hours and overtime provisions. The Employment Standards Act, S. 65(1)(d) allows regulations to be adopted that exempt any industry, activity, business, work, trade, occupation, profession, or class of employers or employees from the Act or parts of the Act, but leaves to the government unfettered discretion as to criteria that might be used in granting these

exemptions. Kinley (1987a) notes that no documentation regarding the rationale for these exemptions survives. The regulatory exemptions would have been adopted pursuant to the standard procedures for adopting regulations at that time. We have no evidence of the input that was solicited or obtained during the adoption three or four decades ago of the regulations that provide for most of the current exemptions. We have only Kinley's (1987a) summary of the debate on the Act which emphasized how flexible the government would be in its implementation so as not to injure the competitiveness of industry or reduce the pay of workers. There is a reference to allowing management and labour to work out how the Act would be implemented. This suggests a negotiated solution in which the interests of the unemployed might be subordinated to the interests of employers and employees. This in turn suggests that the commitment to worksharing was far stronger in principle than in practice. Health and safety concerns, and organized workers' own desires regarding hours and overtime, might, in contrast, be well represented in this process.

2. Permits and Special Permissions

Three types of permits and two types of special permissions are issued, each with its own process.

The first major form of permit is the "100-hour" permit, granted under section 20(1) of the Act, and remaining in force until revoked by the Director. This permit allows an extra 100 hours per year of work exceeding the 48 hour workweek. The Act specifies no criteria for granting or refusing this permit, and the Ministry does not require that the employer specify why the added hours are needed, nor that the employees be consulted (Kinley, 1987b). Denial of an application for a 100-hour permit is rare, occurring only when the

Employment Standards Branch has independent information about abuses of the hours and overtime provisions of the Act by the employer. Large numbers of these permits have been granted, although it is not known how extensively they are utilized. The absence of input from employees for this permit undercuts the health and safety rationale for both the daily and the weekly limits on hours of work. The lack of public input or any fact-finding process and the unlimited duration of the permit undercut the worksharing rationale of the hours limits. This permit shows that whatever the objectives of the Act, they may be traded off against the desires of any employer. If worksharing is a genuine rationale for the Act, it is pursued primarily through the yearly limit on hours implicit in the weekly 48 hour maximum plus the 100 hour permit, rather than through a rigid imposition of either 8 hours per day or 48 hours per week.

Special permits are authorized in Section 20(2) of the Act. These permits may only be granted on a showing that "the work or the perishable nature of the raw material being processed requires hours of work in excess of those permitted under subsection (1)." The Employment Standards Branch investigates each application to verify the special conditions that are alleged, also examining the local availability of workers who could perform the work (Kinley, 1987b) at least to the extent of inquiring about the number of the employer's employees who are laid off. Recent administrative decisions require that the position of the union be presented in the permit request. However the Branch is not bound to reject an applica tion that is not supported by the union. Special permits are said to be closely controlled, cover specific categories of workers, and expire at the end of a year. The ease with which they are granted varies with the

unemployment rate. The process here clearly reflects a concern about worksharing, and perhaps a concern about the other two primary objectives of the Act. Often, however, the request for a special permit preceeds the need for the permit by only a few days or weeks. The need to decide quickly clearly limits the opportunity for the Branch to gather independent information (Hill, 1987). Furthermore, the Branch finds it very difficult to evaluate industry claims regarding the necessity for special permits (Kinley, 1987b, Scott, 1986). Thus while this permit seems most responsive to the objects of the Act, it is also the most difficult to administer, and is a source of continuing concern for the Employment Standards Branch.

The third category of permit is the industry permit, of which 26 are currently in place, issued under the authority of Sections 18 and 20 of the Act. Most industry permits extend the maximum workday to 10 hours. Some incorporate a 100 hour permit, but others provide for greater increases in allowed hours beyond the weekly 48 hour limit, such as "hours of work as required," or "250 hours per year," "twelve hours per week," the latter for certain special occupational groups. (Kinley, 1987b). Industry permits remain in effect until revoked. Most were developed during the first five years after the 1944 Act was adopted, as a result of negotiations between the Ministry and industry representatives. It is not clear what justification was offered at the time. Perhaps more important, their perpetual life means that there is no examination whether current conditions still warrant the permit. Given the changes in industry structure that have occurred in the last four decades, it is surprising that there has been no change in the number or terms of these permits. These permits undercut the worksharing rationale for the Act, since there

is no ongoing investigation of the availability of unemployed labour. They may or may not be consistent with the rationale pertaining to health and safety, or the protection of workers with little bargaining power, since we do not know what evidence was reviewed at the time that the permits were issued.

One special permission is granted under Section 18 of the Act, which provides for increases in the maximum workday up to a maximum of 12 hours, upon such terms and conditions as the Director may prescribe. Current practice requires that the employer submit a work schedule showing the pattern of hours to be worked if the permission is granted (Hill, 1987). Kinley, 1987b) notes that the workday limit has never been regarded as seriously as the workweek limit, and that permission for extra hours is generally granted where the workforce wants the change. Such special permission remains in effect until revoked. The practice of seeking worker assent suggests that health and safety and worker desires are the primary motivation for the limitation on the maximum length of the workday, rather than work-sharing.

The second form of special permission allows the hours worked to be averaged over a period of two weeks or more for purposes of determining the hours to which overtime pay applies (Regulation 285, S. 2(2)). Such averaging is allowed only upon approval by the Director; the approval will specify the number of weeks over which the averaging may take place. The daily and weekly hours limits do not apply where averaging is approved. An applicant for averaging must provide evidence of employee approval of the proposed hours, and must present a schedule of the hours (Kinley, 1987b). This special approval only modestly increases the amount of overtime that may be

worked, and thus slightly undercuts the worksharing rationale of the Act. Since employee input is sought, the protection of worker preferences is left intact. Health and saftey concerns may be somewhat protected, through employee input, although there is no apparent requirement for serious input on the health and safety question.

3. Enforcement

The final means of introducing flexibility into the Act is through selective enforcement. The discretion of the Director as to how to deploy resources determines what provisions of the Act will be enforced most stringently, and what infractions will be overlooked. Exemptions may be granted de facto by failing to enforce certain provisions. The bulk of the enforcement activity consists of investigations in response to complaints. Over 90 percent of these complaints are from ex-employees, most of whom are demanding compensation for overtime, vacation or holiday pay, back pay, or severance pay (Kinley, 1987b). Audits are also conducted, to determine compliance with provisions of the Act. The number of audits is small and declining in response to the pressure of an increasing volume of complaints. One-third of all audits reveal violations of the Act (Task Force Phase I Report, 1987, Ch. 5) and it is estimated that 24 excess hours are worked for every excess hour allowed by a permit. This summary suggests that the primary effect of the enforcement activity is to enforce the pay provisions of the Act, while the hours provisions receive scant attention and are routinely violated. The violations of the hours provisions, however, are not necessarily a defect in the administration of the Act. It may be seen simply as one means of introducing flexibility into an

otherwise unrealistic attempt to apply unreasonably strict uniform hours limits to diverse employers and employees. Alternatively it may be a realistic response to the great difficulty that would attend attempts to enforce vigorously provisions of the Act in cases where neither employers nor employees desired enforcement. The small volume of complaints about hours violations may reflect ignorance of the law or fear of reprisal, notwithstanding legislative protection of the worker's rights. However it also suggests that most employees do not harbour significant concerns about the health and safety effects of their working hours, nor feel that their desires are being unreasonably thwarted by the hours that they work under the current relaxed regieme.

E. Conclusions

This review of the process by which exemptions and the permit system were adopted allows only weak conclusions to be drawn regarding the true objects of the Act and of the exemptions. It is clear that the Act is intended to be flexible, and not to impose great burdens on any firm or industry. It is also clear that the stated objects of the Act are traded off against other objectives. There is no evidence that health and safety is a major consideration in the administration of the Act. The worksharing objective and the protection of those with limited bargaining power are pursued with some success.

## III. ALTERNATE FORMS OF EXEMPTION

### A. Introduction

We now turn from the examination of the reasons for the current exemptions from the hours of work and overtime provisions of the Act to an analysis of the various forms that those exemptions might take. In this section we will assume that imposing some restriction on hours worked is justified by the reasons discussed above. The issue considered here is the implication of choosing one or more of the various policies that may be used to impose such a restriction, some of which are already in use. The analysis will examine the costs and benefits to employees, employers, and society of competing policies. In conducting this analysis, we will refer to literature that has in the past examined the costs and benefits of various forms of regulation of a variety of economic activities. In particular, we will draw upon the analysis of the regulation of pollution discharge, which shares a number of common features with the regulation of hours of work.

This analysis will focus on policies that restrict the weekly hours of work. This focus is justified by two factors: the absence of any evidence that regulating daily hours achieves an objective that is not achieved by regulating weekly hours, and by the absence of evidence that the daily hour limit has been enforced until recently, when it has received only modest attention.

### B. Types of Policies

Five basic types of policy will be examined, combinations of which would represent almost any policy that might be proposed for actual implementation.

1. Limit and Price. [Overtime trigger and premium.]

A limit is set on the number of hours per week that may be worked, and the employer pays a premium for any hours worked beyond this amount. This is the present overtime trigger mechanism, which requires payment of time and one half for hours exceeding 44 per week. Design of the policy involves the government choosing the number of hours that will trigger the overtime premium, and choosing the added amount that must be paid for each overtime hour. The allowed number of hours per week might be the same for all employers in the province, or it might differ by industry, by type of work, by region, or even by firm.

The overtime premium is analogous to a policy sometimes employed in the field of environmental regulation: setting a limit on pollution discharge and collecting a charge for every unit of pollution discharged beyond this limit. A number of Canadian municipalities use such a charge, called a sewer surcharge, to discourage large plants from discharging highly concentrat ed wastes into the municipal sewer system. In these cases, the revenues generated by the charge are retained by the municipality to cover a portion of the cost of operating municipal sewage treatment facilities. It has also been proposed that charges be levied on discharges of pollution into the natural environment, with the proceeds collected by the government. Such charges are not widely used for environmental control because of difficulties in monitoring the quantity of pollution discharge, and because of political resistance by industry to what they perceive as a new tax. In addition, environmentalists have resisted the effluent charge on the grounds that such a policy amounts to "selling a license to pollute." While this argument has

been effective politically, it suffers the logical flaw that traditional regulatory policies, by setting allowed emission standards, involve giving away a free "right to pollute" (Dewees, 1983, Ch. 6).

The monitoring problem is less severe in the case of the overtime premium than in the case of the effluent charge, since employees have an incentive to ensure that their entitlement to this pay is properly calculated, and because the Employment Standards Branch in principle already monitors overtime hours to enforce the daily and weekly hours limits. Political resistance by industry to the principle of an overtime premium has also not been overwhelming, perhaps because it is recognized that in many cases workers will resist overtime unless a premium is paid.

An alternative overtime premium system would involve an overtime tax being paid, not to the worker but to the government, for every hour worked beyond the limit. Like the overtime premium paid to the worker, the overtime tax paid to the government creates a financial incentive for the employer to hire additional workers rather than working current employe es overtime. The overtime tax paid to the government would meet justifiable resistance from labour which would resent the loss of a traditional right. There are instances in which the workers receive time and one-half for overtime and the employer pays some additional amount into a fund that is not part of the workers' pay and benefits package, for example, a training fund. However, it is not apparent that labour would support a large tax (for example half time) to be paid to the government. In addition, it would often be necessary to pay an overtime premium in any event to induce workers to accept overtime hours. We will not consider the overtime tax extensively, since its only advantage over the present

system of overtime premium pay is that it would discourage the employer from seeking overtime work without encouraging workers to accept that work.

2. Limit, and Right to Refuse.

A limit is set on the number of hours that normally may be worked, and the employee is entitled to refuse to work additional hours without being penalized by the employer. This is a feature of the current legislation, whereby employees may refuse to work in excess of eight hours per day or 48 hours per week, even if an exemption or permit allows such excess hours. In practice there is concern that employees may fail to exercise this right because of fear that the employer may retaliate, despite the prohibition against such retaliation in the Act. The worker is protected from demands for long hours, but the benefits to society (if any) from hours limita tions are not reflected in the decision-making of the employer and employee. The allowed number of hours per week might be the same for all employers in the province, or it might differ by industry, by type of work, by region, or even by firm. The distinctive feature of this policy, however, is not that the limit might vary from one workplace to another, but rather that the employee has, in principle, an individual right to decide whether to work overtime hours.

There is no analogue to this policy in the environmental field.

3. Limit with Averaging.

A limit is set on the number of hours per week that may be worked, but the employer is entitled to <u>average</u> those hours over two or more weeks. This is like using a period longer than one week as the basis for the limitation. It allows overtime in one week that is balanced by more time off in the next. Regulation 285, S. 2(2) under

the Act currently allows averaging over a period of two or more weeks when approved by the Director. Averaging might apply to the maximum number of hours only, or to the trigger for overtime pay as well. Under this policy, the government must decide the period over which averaging will be allowed. The allowed number of hours per week, and the length of the averaging period, might be the same for all employers in the province, or they might differ by industry, by type of work, by region, or even by firm.

The environmental analogue to this policy is averaging pollution emissions over a longer than usual period of time. Pollution discharge limits are generally specified as rates averaged over one-half hour, or in some cases, over 24 hours. Where the monitoring technology is available, averaging over longer periods would be feasible. Its desirability would depend upon the environmental consequences of allowing high short-term pollution concentrations, provided that they are followed by low concentrations. The Ontario acid rain regulations set total discharge limits on an annual basis, thus effectively allowing averaging over the entire year (Ontario, Ministry of the Environment, 1986).

4. Limit, Absolute

A limit is set on the number of hours per week that may be worked. There is no mechanism for permitting hours in excess of this limit, except for emergencies. It is an offense to violate the limit, as is the case under the present Act (S. 59) and the sanction is a fine. If an employer violates the limit, it faces some expected penalty that depends upon the probability of being detected, the probability of being charged if detected, and the magnitude of the fine that might result if convicted. These probabilities and the

likely magnitude of the fine will depend on a variety of factors including the extent of the violation (how many hours in excess of the limit were worked and how many workers were involved) and the past history of the offender. The employer is therefore likely to treat the limit not as an absolute barrier, but as a standard which may result in an expected cost that increases with the extent to which it is exceeded.

The allowed number of hours per week might be the same for all employers in the province, or it might differ by industry, by type of work, by region, or even by firm. Under the present system, the statutory limit is universal, but exemptions provide the needed flexibility.

This policy is similar to most environmental legislation which specifies emission limits, non-observance of which constitutes an offense. In some cases, the limits are identical for all sources, while in others, such as Ontario's acid rain program, they are established separately for each source (Ontario, Ministry of the Environment, 1986). The Ministry of the Environment faces a problem similar to that faced by the Employment Standards Branch; polluters vary greatly in their desired emissions, and many demand variations from the universal standard. Often these demands are backed by threats to shut down and lay off the workers. Generally the Ministry of the Environment cannot evaluate these threats with great confidence.

5. Limit with Exemptions (Present Policy)

Any one of the policies listed above might be adopted with the specific intention of varying the weekly limit by industry, by class of work, by region, or by firm. Requests for exemptions or varia-

tions would be processed according to a standard procedure. They might be granted upon request by the employer; upon a joint request of the employer and the employees; or upon an independent finding by the Branch that certain conditions are met. The exemptions might require opting out, as is the present practice, so that the standard limit applies unless an application for an exempton is granted. Alternatively they might require opting in, so that the limit would only apply if its application were requested by employees.

Many environmental regulations are of this form. Often a single standard is promulgated, regulating pollution discharge uniformly, but upon application individual sources are granted extended time to comply or they are even granted an individual standard in excess of the general standard. The authority to approve a program of pollution control that exceeds standard emission limits is contained in the Environmental Protection Act, (R.S.O. 1980, Ch. 141, S. 9, S. 146(2)). Environmental regulations are often set on an industry basis, rather than requiring all sources of a pollutant in all industries to meet the same standard.

C. Economics of Policies

The choice among these policies may be analyzed by examining the costs and benefits that they impose on employers, on employees, and on society (other than employers and employees). We will generally refer to the employer as a firm, although many employers in Ontario are unincorporated enterprises or individuals such as a homeowner employing a domestic.

1. Costs to the Employer.

Employers may suffer costs if a limit is placed on the number of hours per week worked by their employees. Such costs might be partly offset by gains in productivity to the extent that workers suffer less fatigue at reduced hours. The net effect of these costs and benefits will be referred to here as the costs of the limit. These costs may arise from lost production, increased hiring costs, or other sources. Some firms that would not choose to request overtime will experience no costs, while other firms may experience high costs. As the weekly limit is reduced, the total costs to some firms will increase, and in many cases marginal costs (the extra cost to the firm arising from a one hour per week reduction in the limit) will increase as well. Increasing marginal costs reflect an increase in the cost to the firm per hour of reducing the allowed work week.

The shape and location of the curve representing this marginal cost of the limit will vary by firm and by industry. One type of firm, call it Firm A, experiences very high marginal costs as the limit moves down toward 40 hours, and would vigorously resist a 40 hour limit. A cost curve such as this might arise in the case of a firm with high product demand and a fixed supply of skilled labour, such as a computer software firm with a rush order. Alternatively, it may arise in the case of a firm with a perishable product, such as an agricultural producer, and a limited time for harvesting by a limited set of workers. In either case, an hours limit will impose costs in the form of lost revenues. Similarly, the employer of a nanny may find the nanny's services far less valuable (and thus more costly per unit of service rendered) if the nanny is not on duty during all of a child's waking hours.

Another type of firm, Firm C, experiences modest added costs even when the limit is reduced as low as 30 hours. A cost curve such as this might arise for a firm using readily available unskilled labour that may be hired and laid off at low cost, for example a fast food outlet. Such a firm will not strongly resist reductions in the limit because its costs are not substantially affected by the length of the work week. Since the cost curve depends in part upon the availability of qualified unemployed workers, the preference of a firm for hiring more workers rather than requesting overtime will automatically be responsive to the local unemployment rate, decreasing as the unemployment rate rises.

Figure 1 shows curves representing plausible marginal costs to the firm of reduced limits for different types of firms, including the two just discussed, and an intermediate type of firm, labelled Firm B.

2. Costs to the Employee.

Employees may experience costs that increase as their workweek increases in length. These costs may arise from health and safety problems, from fatigue, or from the worker's desire not to spend long hours at work because of family or other commitments. The costs may be financial, or they may represent the worker's preferences. As the weekly hours increase, the costs increase, and in many cases, marginal costs will increase as well. The shape and location of the marginal costs curve will vary by industry, firm, job classification, and worker. One type of worker, worker D, experiences high marginal costs as the weekly hours increase toward 40, because of important non-work time commitments. An example would be a parent of small children in a two-income family. Such a worker would prefer to work

no more than half time. Another type of worker, worker F, experiences low marginal costs even at a work week of 60 hours, because of the absence of outside commitments, or a preference for work over leisure activities. Examples would be aspiring performing artists, or workers on remote job sites far from family, friends, or diversions. Worker F would generally volunteer for all available overtime. Figure 2 shows curves representing plausible marginal costs to the worker for different workers. Worker E is intermediate between D and F.

3. Costs to Society

Society may experience costs other than those of the employer and worker when overtime is worked. The principal source of such external social costs is alleged to be increased unemployment in those cases where unemployed workers are available to replace workers who are on overtime. The external social cost of unemployment will in general be proportional to the unemployment rate, since the cost per worker is independent of the number of workers unemployed. If it were the case that every hour of overtime represented an hour that might have been worked by someone currently unemployed, then the external social cost of overtime would be proportional to the number of overtime hours. In this case, the marginal external social cost would be a constant amount per hour of overtime. This implies that the social cost from one person-hour of added overtime is the same whether the overtime limit is set at 40 hours or 48 hours. Curve G in Figure 3 shows a constant marginal cost of a weekly hours limit. In the special case of a large employer in a small town, reduced hours of work might absorb all available workers, in which case the

external social cost of overtime would fall as the amount of overtime fell. This is shown by curve H in Figure 3.

If it were the case that long hours caused increased health and safety risks, this would impose costs on the employer and the employee, but also on society since tax revenues support costs of medical care and some other costs of disabled workers. In the absence of evidence that significant health and safety risks are associated with long hours, this is not reflected in the curves of Figure 3.

4. The Social Optimum

Economic efficiency involves minimizing the sum of the costs of overtime to the employer, the worker, and to society. This requires finding the hours of work at which the sum of these three total cost curves is minimized. In terms of the marginal cost curves of Figures 1 to 3, the optimum is the point where the marginal cost to the firm of less work (which is the same as the marginal benefit to the firm of longer hours) equals the sum of the marginal cost to the worker and the marginal external social cost.

Suppose that there was no external social cost to overtime, either because overtime does not displace unemployed workers, or because the unemployment rate is in equilibrium, and because generally there are no health and safety implications of overtime work. In this case, the optimum would be the point where the marginal benefit to the firm equalled the marginal cost to the worker. At this point, the amount that the firm is willing to pay in wages and benefits for one hour of added work just equals the amount that a worker would demand to be willing to work the additional hour. Private bargaining between the employer and employees should

take these private costs into account, and should in fact lead precisely to this optimum. This is the operation of the invisible hand of Adam Smith whereby the self-seeking actions of individuals lead to the best for all. In this case, there is no need for a limit on hours of work, because no improvement may be made over the private bargain struck by employer and employees.

We would of course observe varying hours of work in different establishments, reflecting the varying costs of employers and desires of employees. This may be seen by examining the curves of Figure 1 and Figure 2. If firm A hired worker F, the work week would approach 60 hours, while if firm C hired worker D, the work week would be less than 30 hours. The many exemptions from the hours and overtime provisions of the legislation regulating hours of work and overtime may be explained in part by the existence of firms whose cost curves vary as in Figure 1 and workers whose cost curves vary as in Figure 2.

Next, suppose that overtime entails social costs over and above these private costs. Suppose further that the unemployment rate is high, and that every overtime hour worked increases total unemployment by some amount less than an hour, imposing social costs. The social optimum for an establishment is the workweek at which the marginal cost to the firm of not extending the workweek by one hour just equals the sum of the marginal cost to the worker of working an added hour plus the external social cost, here assumed to be constant. The social optimum will, in every case, involve fewer hours per week than the private optimum in the absence of social costs. This analysis shows that recognizing the external social cost associated with unemployment may lead the socially desirable length

of the workweek to be less than that which would be negotiated between the firm and the workers if the workers or employers do not incorporate that external social cost in their negotiations. In terms of the Figures at the end of the paper, the optimum occurs at the point where the firm's marginal cost curve from Figure 1 intersects a curve representing the sum of the worker's marginal cost, from Figure 2, plus the external social cost, from Figure 3.

The optimal number of hours will, however, still vary enormously from one firm to another. Firm A hiring worker F might now have a 55 hour week in place of a 60 hour week. Firm C hiring worker D might now have a work week of 22 hours instead of 25 hours. There is nothing in the introduction of social costs from overtime that would cause the optimal workweek to be of the same length in all workplaces. This reflects the fact that the private costs and the social costs of hours worked may differ among different workplaces. Indeed, the amount of <u>diversity</u> in optimal hours of work may be unaffected by the introduction of social costs. Any attempt to impose a <u>uniform</u> workweek across all employers and employees fails to acknowledge the fact of diversity. The exemptions and permits that are part of the administration of the present Act are one way of accommodating the diversity.

D. Evaluation of Policies

The difficult task for those who would frame policies that respond to the possible social costs of overtime hours is to do so in a way that reflects the diversity in the length of the socially desirable workweek in various work environments. This diversity could be accommodated in a variety of ways: exemptions, permits, averaging

provisions, premiums without absolute limits, or flexible enforcement.

It is clear that policy 4, the absolute limit on hours worked, is inefficient, imposing great costs or hardship in some cases, if applied uniformly to all workers and workplaces at a level that actually constrains hours in many establishments. What is gained by forcing the worker on a remote job site into hours of idleness every day, or ordering the performing artist not to perform another time this week? How is the farmer to gather crops in the brief time between rain, hail and frost? Is the software firm to be forced to default on its contracts because willing workers are barred from further work? The alternative is to set the limit separately for various industries, regions, firms, and even classes of workers. Yet the Branch has acknowledged that it experiences difficulty in assessing the information presented by firms in support of applications for special permits. This incapacity, which represents not lack of talent or diligence but rather the impossibility of the task, means that an attempt to allow the standard to vary from one workplace to another will tend to degenerate into granting anything that is agreed to by an employer and employee, and many things that are requested by employers without vigorous resistance by employees. In this process, the concern for social costs may be lost. The absolute limit is either inefficient if uniform, or ineffective if variable, given the nature of the problem at hand.

The limit with exemptions, policy 5, suffers from the same flaws as the absolute limit. The Branch must decide which requests for exemption to grant. In the past, most requests have been granted. In the cases where the Branch has attempted to exercise judgment, it

has found the task daunting, if not insurmountable. One purpose of the limit is to protect employees with limited bargaining power, but their interests are served by a policy with exemptions only if the employees manage to present a convincing case to the Branch opposing a request for exemption. Yet the groups most in need of this protection may be least able to present an effective case to the Branch. As in the case of the absolute limit that varies from one firm to another, it will be a rare case where the Branch will be able to determine that there is a social benefit from granting less than is requested, and that the effect of this partial denial will not be to impose unacceptable costs on the firm and its current workers. Thus the limit with exemptions is workable, but often ineffective in achieving the stated social goals of the legislation.

The limit with averaging, policy 3, is more flexible than the absolute limit, but only slightly. It has been applied only where the employer can present a schedule of hours to be worked. For all other cases, the problems just identified remain. Averaging may allow some short-term flexibility in hours, but cannot rescue the absolute limit.

The limit with the right-to-refuse allows the individual worker to decide whether or not to work beyond the weekly limit. In essence, the workweek will be determined in a private bargain between employers and their employees, with individual employees having the right to opt out of extra hours that the collective has agreed to, or that the employer may subsequently request. This introduces flexibility that accomodates the highly varied desires of employers and employees. The need for Ministry enforcement should be minimal, since the employee takes the initiative in refusing, except for the

difficulty, which has been experienced in administering the present Act, in ensuring that the employee who refuses overtime is not in some way penalized for refusing. Unfortunately, the social cost of overtime that motivates the policy is completely lost in this process. There is no reason to expect most employees to include in their decision the benefits to unemployed workers of their working less. The externality that gave rise to the limitation on weekly hours in the first place is not addressed in this policy. The policy is workable and protects the individual employee, but does not promote worksharing.

What of the remaining policy, the limit and price? We know that this policy is workable, since it is a part of the present policy that has presented relatively few problems. It is effective in that it succeeds in imposing significant costs on employers whose employees exceed the relevant trigger hours. If the current incentive were deemed inadequate, the incentive could be increased by raising the premium rate, lowering the trigger hours, or enforcing more strictly. This policy may therefore cause a significant incentive to substitute added workers in place of overtime hours by existing workers. The policy protects those with little bargaining power, so long as they are not exempted from its coverage. It accomodates the varied desires of employers and employees because it imposes no fixed limits. Any type of firm and any type of workforce can achieve an equilibrium in the face of an overtime premium, that will involve fewer overtime hours than in the absence of the policy, moderate costs to the firm, and positive social benefits where those benefits exist. It appears that this policy dominates the others.

There is a reason why the overtime premium works when other

policies do not; the policy is matched to the problem. Recall from section III. C. 2, above that the worksharing objective is, in general, represented by a constant marginal social cost, as shown by curve A in Figure 3. In other words, the social harm, if any, from one added hour of overtime is constant, regardless of the amount of overtime per worker. Since the marginal social benefit of worksharing is constant, a price per hour worked can perfectly represent that harm. An overtime premium is represented in Figure 3 by a horizontal line, just like Curve A. In economic terms, setting a price at the level of curve A in Figure 3 internalizes the externality. There is no magic in achieving any particular level of overtime. Setting a work week limit imposes a quantity limit that must necessarily be arbitrary, since it cannot be derived from Figure 3. An overtime limit is represented by a <u>vertical</u> line, which of course does not in any way approximate the social cost curve A. Worse yet, this arbitrary limit may impose large costs on firms or workers unless it is tailored to each workplace, which the Branch has discovered is extremely difficult to do without losing all effect of the policy.

The argument that in a world of uncertain information a horizontal social cost can best be represented by imposing a price rather than a quantity was first developed by Weitzman (1974) in connection with environmental problems. It is just as applicable here as in the environmental case.

This does not mean that the policy is without problems. First, there remains the issue whether the overtime trigger should be the same for all industries, or whether it should vary by industry as is the present case. Other provinces have allowed the overtime trigger

to vary for some industries and occupations. If the object of the policy is worksharing, then one could enquire whether there are industries or occupations for which worksharing is unlikely to be achieved by reduced overtime, and therefore compulsory overtime pay is without benefit. Alternatively, one could enquire whether the industries or occupations currently exempted from the overtime provisions can demonstrate that the cost of complying with the standard overtime provision would impose undue hardships.

A second problem with the overtime trigger and premium is that it is an impersonal and automatic mechanism for creating incentives. While these characteristics are admired by economists, organized labour often prefers not to be subject to such impersonal forces. In the case of layoffs and overtime, just as with many other workplace policy issues, labour would prefer to be involved in the decision-making process. A procedure that requires that labour be consulted allows labour to express its preferences, voice the extent of its concerns, and offer its preferred options. Even if consultation does not involve a vote on the outcome, the process of consultation may lead to solutions that are more satisfying to labour. Thus, labour may prefer a strict rule with exemptions or permissions granted on a case-by-case basis, with input solicited from labour.

Third, should the overtime trigger or the overtime premium vary by time and location according to the prevailing unemployment rate? Theory suggests that the answer is "maybe". If unemployment has fallen to a social target or equilibrium, then the external social benefit from reducing overtime may be closer to zero than to the overtime premium. On the other hand even when the unemployment rate is high, it is not clear that the external social cost, per day of

unemployment, is any greater than when the rate is slightly above the equilibrium. Indeed, we assumed above that the external social cost is invariant so long as the unemployment rate is above the equilibrium or target level. If this is the case, then the statutory overtime premium might be zero when unemployment is low, and time and one-half when it is high. The desirability of varying the trigger is greater, since at times of high unemployment a drop in the trigger would induce firms not otherwise subject to the premium to pay it and thus to contemplate replacing overtime with new workers.

It is doubtful, however, whether it is practicable to vary the statutory premium and trigger hours by location and over time in response to measured unemployment rates. Equally dubious would be the reception of such a scheme by both employers and employees who must enter into labour contracts without knowing what unemployment rate may prevail during the life of the agreement. It seems likely that most contracts would specify the standard premium rate at all times. It is possible that firms would ignore reductions in the trigger hours unless these were of long duration. Overall, an adaptive policy is theoretically attractive, but poses considerable practical problems.

Fourth, what is the proper magnitude of the overtime premium? Here again theory provides little guidance. In principle, the premium should reflect the marginal social cost of the unemployment that results from an added hour of work. However there is still debate whether reductions in the workweek do in fact have <u>any</u> impact on unemployment, so that there is unlikely to be agreement on <u>how much</u> less unemployment is associated with one less hour in the workweek. There is thus little basis for establishing a "correct"

overtime premium rate. In the absence of evidence to the contrary, prudence would dictate continuing with the present rate, on the grounds that at least it has long been accepted by all parties.

## IV. APPROACHES TO REFORM

A system involving only an overtime trigger and premium, and abolishing the daily and weekly hours limits, could be relatively simple, with some variations in the trigger for special sectors and a few sectors exempted altogether. No permits would be required in the absence of limits on daily and weekly maximum hours. If, on the other hand, the current political climate dictates that some limits on daily and weekly hours will continue, what improvements may be made to the present system? How might the number of exemptions and permits be reduced while promoting the worksharing objective of the Act, and recognizing the essential need for flexibility by heterogeneous employers and employees?

### A. The Starting Point

One might assume as a starting point either of two extreme simple systems. The first or "opt-in" system would prescribe maximum daily and weekly hours, but initially impose these limits on no employees; employee groups that desired hours protection would apply to the Director to be covered by this provision. The second or "opt-out" system would apply the prescribed maximum to all employees; employers that desired a different regime would apply for exemptions or permits. Either of these approaches would cause consternation among employees or employers because of the sudden change from the present

status, a change that might or might not be reversed, and only after pursuing an uncertain administrative process.

An alternative approach would be to recognize that individuals and organizations believe that they acquire property rights in an existing regulatory scheme (Gregory, 1986). A government should not lightly modify or abolish property rights. The notion of rights supports an approach that begins with the existing trigger and overtime premium, the existing hours limits and the associated exemptions and permits.

As between these two starting points, the latter is preferable both because it recognizes some legitimacy in current arrangements and because it approximates much more closely the final outcome regardless of the starting point. When travelling the regulatory road, the best trip is a short trip.

B. The Structure of Flexibility

The limit on daily and weekly hours is very rigid. That it is unachievable and perhaps undesirable in general is evidenced by the myriad of exemptions and permits, not to mention violations that occur. The eight hour daily limit is especially constraining since it represents not a minimum standard of protection but the <u>average</u> or <u>norm</u> for many sectors of the economy. In a time of increasing demands for flexibility among a workforce growing ever more heterogeneous, and among employers subject to increasing domestic and international competition, rigid application of the eight hour limit is unthinkable. Ideally, the daily hours limit should be abolished (perhaps retaining the right to refuse after eight hours), recognizing that as a maximum workday, the limit serves no important

function. Alternatively, the limit should be raised, to ten or twelve hours, so that it constrains only a limited fraction of all workers. If neither of these adjustments is made, then a block of hours in excess of the daily limit, perhaps 250 per year, should be granted automatically to all employers so that few would need to apply for permits that are apparently granted routinely in any event.

Permits or exemptions from the weekly hours limits must also be retained in some form, to satisfy the need for flexibility at this level. Here, too, some block of hours might be granted automatically to all employers, to be spread over the year as needed. Such automatic grants would reduce the need for the Branch to process applications that will be granted more or less automatically.

One way to maintain flexibility is to shorten the duration of any permits that are retained. Blanket exemptions or industry permits might be replaced by exemptions or permits renewable every five years upon a showing that the conditions justifying exemption still exist. This shortening of the duration of a permit would only be desirable if the basic restrictions of the Act are relaxed as suggested above. Whether it is better to use an exemption or a permit should depend upon whether the conditions justifying the flexibility are thought to be permanent in an industry or only transitory.

C. Who Should Grant Exemptions and Permits

The Task Force might deal with substantive issues, identifying which industries and workers should be held to the basic hours limits, and which should be granted flexibility. Alternatively, the Task Force

could deal with process issues, setting forth the procedures and criteria by which these decisions should be reached. An argument in favour of dealing with process rather than substance is that it is not clear that the Task Force has followed a procedure that is appropriate for determining substantive issues on an industry-by-industry basis. Affected parties might complain that they had not been notified that the specific rules under which they operate were to be revised, as opposed to a general review of procedures and the structure of administration of the Act. Only if all parties received proper notice that changes in exemptions and permits were to be recommended, and were given a full opportunity to submit briefs on this issue, and to argue their case, would it be proper for the Task Force to recommend such changes.

The process for granting permits and special permissions is not specified in the Act, but has been developed by the Branch over the years. The Task Force might endorse the present structure. Alternatively, it might recommend changes in the procedures to be followed by the Director, or suggest criteria that might be applied in deciding whether to grant a permit. Given the need for flexibility if hours limits are retained, I would recommend that the present informal procedures be retained.

D. The Process

The present system of permits and exemptions leaves the status quo in place, to be altered only when an employer applies for a permit, or when a special permit expires at the end of the year. An alternative approach would be to institute a regular comprehensive review of all permits, and perhaps all exemptions. A body could be set up to

complete such a review on a regular timetable. Criteria for determining whether permits and exemptions should be continued would be recommended by the Task Force, which might also suggest the relative priorities to be assigned to the review of the various types of permits and exemptions.

An alternative process would leave the current permits and exemptions in place unless a party moved to reconsider, in which case the Director would have to decide whether, according to current criteria, the permit or exemption was warranted. This approach presumes that the present system is essentially reasonable, and that it can be improved with adjustments from time to time. Given the difficulty that the Branch must experience in assessing the merits of requests for permits, this is surely the most reasonable strategy.

We would be remiss not to consider the costs of administering a revised program. If it is true that both employer and employee generally support exemptions and permits, then worksharing is the primary motive for the restrictions on overtime hours. Imposing restrictions depends upon a belief that doing so will increase the number of workers employed, without a disproportionate cost to the employer and current workers. The empirical evidence on this issues is apparently mixed. The facts required to determine whether increased hiring will result from imposing hours restrictions on a particular employer or industry are extremely difficult to ascertain. The work of the Director reviewing permits and exemptions in this situation would be extraordinarily difficult, with each decision being a close decision. If the scrutiny by the Branch of the permits and permissions is stepped up, the resources consumed by

the Branch and the parties appearing before it could be immense, with no assurance that significant gains were to be achieved.

## V. CONCLUSIONS

The primary purpose of hours of work and overtime regulation today appears to be worksharing. The costs of reducing the workweek vary enormously from one industry to another, as well as between employers as diverse as Ontario Hydro, an auto parts manufacturer, a computer software company, a fast food outlet, and the employer of a domestic servant. The desire to work long hours varies considerably from one worker to another, from the parent of small children in a two-income family to the single worker with few non-work interests, to the construction worker on a remote job site. The Branch has and can acquire only limited information on the true cost and financial conditions of employers and on the desires of workers.

It follows that a policy of fixed work hours is both inefficient and impractical, will be resisted by both employers and employees, and will lead inevitably to a demand for widespread and varying exemptions. This is especially the case with respect to the eight hour day, which is not a <u>minimum</u> standard, but a <u>typical</u> workday, and which is regularly and voluntarily exceeded by a significant proportion of the Ontario workforce. Since the Branch has limited information, it will experience great difficulty in granting such exemptions and still pursuing vigorously the worksharing goal. The policy that appears to be most efficient and practicable for encouraging worksharing is the overtime premium, which imposes significant but not crushing pressure to replace overtime with new workers. Ideally, the daily hours limit should be abolished (perhaps

retaining the right to refuse after eight hours), recognizing that as a maximum workday, the limit serves no important function. Alternatively, the limit should be raised, to ten or twelve hours, so that it constrains only a limited fraction of all workers. If neither of these adjustments is made, then a block of hours in excess of the daily limit, perhaps 250 per year, should be granted automatically to all employers so that few would need to apply for permits that are apparently granted routinely in any event.

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Costs of Weekly Hours Limits

Figure 1

Marginal Cost to the Firm
of Weekly Hours Limits

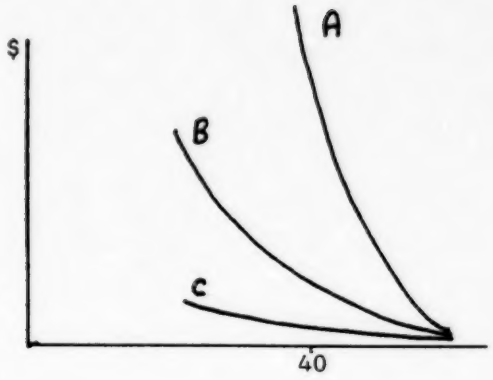



Figure 2

Marginal Cost to the Worker
of Working Long Hours

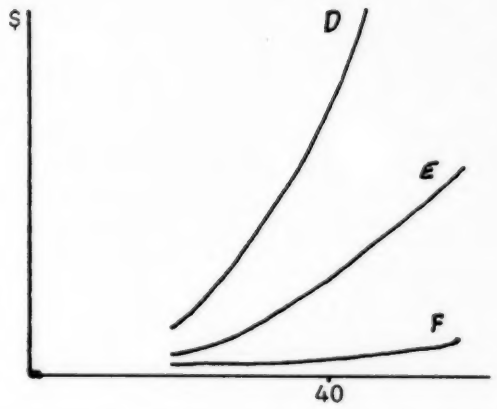
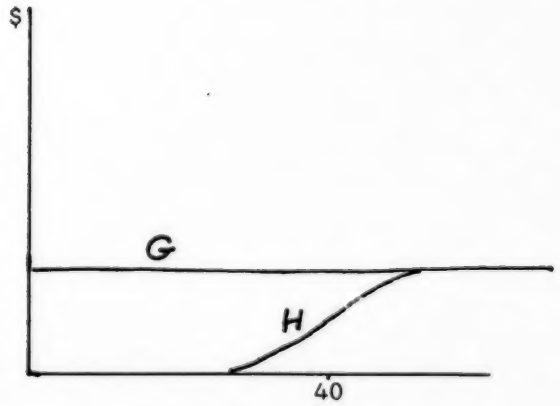



Figure 3

Marginal External Social
Cost of Allowing Weekly
Hours Limits




Hours/Week